

1 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
A Limited Liability Partnership

2 Including Professional Corporations

ORI KATZ, Cal. Bar No. 209561

3 J. BARRETT MARUM, Cal. Bar No. 228628

MICHAEL M. LAUTER, Cal. Bar No. 246048

4 Four Embarcadero Center, 17th Floor

San Francisco, California 94111-4109

5 Telephone: 415.434.9100

Facsimile: 415.434.3947

6 E mail okatz@sheppardmullin.com

bmarum@sheppardmullin.com

7 mlauter@sheppardmullin.com

8 Attorneys for MedCision, LLC

10 UNITED STATES BANKRUPTCY COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO DIVISION

13 In re:

14 MedCision, LLC,
15 *f/k/a BioCision, LLC,*

16 Debtor.

Case No. 17-31272

Chapter 11

**REPLY IN SUPPORT OF DEBTOR'S
APPLICATION FOR ENTRY OF AN
ORDER AUTHORIZING THE
RETENTION OF KYLE EVERETT OF
DEVELOPMENT SPECIALISTS, INC.,
AS ITS CHIEF RESTRUCTURING
OFFICER**

19 Date: March 22, 2018

20 Time: 10:00 a.m.

Judge: Hon. Hannah L. Blumenstiel

21 Place: 450 Golden Gate Avenue
22 16th Floor, Courtroom 19
23 San Francisco, CA 94102

1 MedCision, LLC, the debtor and debtor-in-possession in the above captioned
2 chapter 11 case (“MedCision” or the “Debtor”), hereby submits this reply brief in support
3 of its application (the “Application”) to retain Kyle Everett as its Chief Restructuring
4 Officer (“CRO”) pursuant to sections 105 and 363 of the Bankruptcy Code filed on
5 February 22, 2018 as Docket No. 91. This reply responds in particular to the sole
6 objection filed to the Application, which was submitted by the Office of the United States
7 Trustee on March 15, 2018 as Docket No. 116 (the “UST Objection”).

8 **A. Responses to the United States Trustee’s Questions.**

9 The U.S. Trustee poses questions in its Objection that seek to clarify the nature of
10 the CRO’s role. The Debtor hereby responds to the questions in a question and answer
11 format, as follows:

12 **Q: What is the purpose of the CRO reporting to the Board?**

13 A: As described in the engagement letter for the CRO attached to the Declaration
14 of Kyle Everett, the CRO will be the officer acting on behalf of the Debtor in the
15 Bankruptcy Case, managing the sale process that is commencing at this time. This is
16 similar to the situation prior to bankruptcy, in which the Debtor was governed by a single
17 officer carrying the title “Manager.” (Suppl. Everett Decl., Exh. A, Operating Agreement,
18 § 7.14(a)). As prior to bankruptcy, the Board exercises its authority over the Debtor
19 indirectly, with the ability to remove that officer serving at its pleasure, in the manner
20 described in the Operating Agreement. (*Id.*) However, as described below, the terms of
21 the CRO’s retention require a termination of the CRO to be for cause, unlike the pre-
22 petition manager which could be removed without cause.

23 **Q: Does the Board, which includes Ehrhardt, retain decision-making (or any)**
24 **powers? If not, what is its role?**

25 The Debtor’s board of directors does not have a direct ability to approve or
26 disapprove of a particular action of the CRO in the Bankruptcy Case. The Debtor’s board
27 has significant knowledge regarding the Debtor’s business and assets that the CRO plans
28

1 to utilize during the sale effort and the Bankruptcy Case generally. In addition, the
2 Debtor's board retains the right to seek removal of the CRO with the Court's approval.

3 **Q: Who is authorized to act for the Debtor if the CRO is appointed – only the**
4 **CRO?**

5 In the Bankruptcy Case, subject to Court approval, the CRO would be the sole
6 officer authorized to act on behalf of the Debtor unless and until he were removed as CRO
7 with the Court's approval.

8 **Q: On what grounds could the CRO be “terminated” and who has authority**
9 **to petition the Court for removal?**

10 The engagement letter provides that Court approval must be obtained to remove Mr.
11 Everett from his position as CRO. Plainly implied in this is that the termination must be
12 for cause, or else the requirement of Court approval would be a nullity.

13 **B. The Appointment of the CRO is in the Best Interests of Creditors.**

14 No party has made a motion to appoint a chapter 11 trustee, but if one were made,
15 the Court would need to consider the best interests of creditors in deciding whether to
16 grant the motion. 11 U.S.C. § 1104(a)(2). In addition, in situations where a chapter 11
17 trustee is appointed, creditors have the ultimate say in the choice of trustee as they may
18 demand an election to be held in which creditors vote for the trustee in the manner set forth
19 in Section 702 of the Bankruptcy Code. 11 U.S.C. § 1104(b).

20 Here, the CRO was appointed on an interim basis, subject to final approval by the
21 Court on an application to employ the CRO, as part of a resolution of multiple contested
22 motions that was supported by the stakeholders in the case, including Debtor's secured
23 creditors and unsecured creditors, as well as the Debtor and the chapter 7 trustee. In
24 addition, despite the Application being noticed out to all creditors as a motion filed under
25 Section 363(b) of the Code, no creditor or other party other than the U.S. Trustee has
26 objected to the Application. The creditors have thus made their own wishes clear: they
27 support the retention of Mr. Everett as CRO.

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1 The creditors' preference is also sensible in light of the facts of this case. The estate
2 needs to conduct a sale of the Debtor's assets in an expeditious manner in order to
3 maximize their value, and the CRO has begun this process by seeking application to
4 employ an investment banker on March 16, 2018. The post-petition financing arranged by
5 the Debtor's CRO from the Debtor's secured creditor is also provided with an expeditious
6 sale process in mind. Replacing the CRO at this stage would disrupt the sale process and
7 create an impression of disorder and confused authority among interested bidders that may
8 lead them to simply wait the process out and see if they could purchase the assets at a later
9 date from the secured lender.

10 Further, the Debtor's estate has already incurred administrative expenses of
11 chapter 7 professionals and others prior to conversion, and simply does not need another
12 reboot that will lead to yet another layer of administrative expense and delay, to no
13 apparent practical end.

14 Finally, the U.S. Trustee has argued that the CRO improperly usurps the process of
15 appointing a chapter 11 trustee, but has cited to no authority suggesting a debtor does not
16 retain its ability to hire officers to represent it during a bankruptcy, as it seeks to do with
17 the retention of the CRO.

18 **C. The CRO's Retention and Compensation is Appropriate and Should Be**
19 **Approved.**

20 As pointed out in the Application, several courts including this one have reviewed
21 and approved a debtor's retention of a CRO under Section 363(b) as opposed to Section
22 327. (Application, at pp. 8-9). In order to be transparent and address any concerns about
23 impartiality, the Application detailed the manner in which the CRO is disinterested and
24 provides for the filing of fee applications under Section 503(b) of the Code. But, as an
25 officer of the Debtor as opposed to an estate professional, the standards of Section 327 (re
26 employment) and Section 330 (re payment) simply do not apply. Finally, it is noteworthy
27 that there is no objection to the terms of the proposed retention as being unreasonable.
28

1 WHEREFORE, for the reasons set forth herein and in the Application, the Debtor
2 requests that the Court approve the Application to retain Kyle Everett as its CRO by
3 entering an order in the form attached to the Application as Exhibit "A."

4 Dated: March 21, 2018

5 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
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8 By /s/ Michael M. Lauter
 MICHAEL LAUTER

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10 Proposed Counsel for Debtor, MedCision, LLC
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